

118 CMR 5.00: INVESTIGATIONS

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5.01: Scope and Purpose

118 CMR 5.00 establishes the requirements for investigations conducted by and on the behalf of the Commission, the standards to be used in delaying or deferring the investigation and the review and oversight standards to be used by the Commission.

5.02: Conduct of Abuse Investigations

All investigations conducted pursuant to M.G.L. c. 19C shall be conducted by all investigators in accordance with 118 CMR 5.00 and with any standards approved and adopted by the Commission for the conducting of such investigations.

(1) Minimum Requirements of Abuse Investigations. Each investigation and evaluation conducted pursuant to M.G.L. c. 19C, § 5 by the Commission or the referral agency, at a minimum, shall be conducted in accordance with 118 CMR 5.02 and with any additional standards for the conduct of investigations adopted by the Commission, including but not limited to:

- (a) a visit to the site of abuse, including but not limited to, the residence or day program of the person with a disability. The visit must take place unless such a visit would create a foreseeable risk of harm to the person with a disability;
- (b) an interview with the person with a disability who was allegedly abused. Such an interview does not require the prior permission of the guardian of the alleged victim; however, the guardian may be notified that such an interview is to take place; unless it is determined by the assigned investigator that giving such notification to the guardian would not be in the best interests of the alleged victim. Such an interview shall include a review of the allegations and a discussion with the person with a disability regarding the needs and wishes of that person regarding protective services. The interview must take place unless it will create a foreseeable risk of harm to the person with a disability. The interview shall occur at such time and in such place that it may be conducted without a risk of harm to the person with a disability;
- (c) a determination of the nature, extent, and cause or causes of the injuries, if possible, unless the allegation is one involving abuse *per se*;
- (d) use of the preponderance of evidence standard to substantiate or un-substantiate the existence of abuse leading the investigator to conclude that it is more likely than not that abuse does or does not exist;
- (e) a determination or confirmation, if possible, of the identity of the abuser(s), whether named or not named in the Intake and who shall be referred to as the “identified abuser(s),” by whose act or omission the person(s) with a disability has/have incurred a serious physical injury and/or serious emotional injury;
- (f) a determination of the identity of the person(s) who was/were responsible for the health and welfare of the alleged victim(s) when the alleged incident occurred, whether said person(s) is/are named or not named in the Intake;
- (g) an evaluation of the site of abuse with a determination of the risk of physical or emotional injury to other persons with disabilities at the same location;
- (h) an initial assessment of the immediate protective services needs of the person with a disability who is the alleged victim of abuse (*See* 118 CMR 7.03 for requirements of the protective services assessment.);
- (i) an interview with a representative of the agency, program or facility that is identified as the site of abuse and any other appropriate person(s);

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- (j) an interview with all available witnesses to the abuse subject to the following conditions:
 1. If any said witness falls within the category of a mandated reporter, he/she has an obligation pursuant to M.G.L. c. 19C to cooperate in the investigation and truthfully provide to the investigator all information he/she may possess that is relevant to the matter under investigation; refusal to be interviewed or to otherwise cooperate in the investigation will be made a part of the report and if the witness is an employee of a state agency, unless a mandated reporter's response to a question could be used against him/her in a criminal proceeding, his/her failure to cooperate shall be reported to the person's supervisor and to the appropriate public agency for possible disciplinary action under that agency's regulations or pursuant to the provisions of any relevant collective bargaining agreement or any other contract;
 2. Said witness may be accompanied during an interview by a competent person of his or her own choice who is 18 years of age or older; provided, that said companion is not a supervisor or administrator employed by the identified abuser's employer; or is not otherwise involved or has an interest in the matter under investigation. Other than being present during the interview, said companion shall not otherwise participate in the actual conduct of the interview;
 3. Said witness shall be informed of the existence of the complaint and the general nature of the allegations. Under no circumstances shall the identity of the reporter be disclosed.
- (k) an interview with the identified abuser(s), unless such an interview would create additional risk of harm to the person with a disability;
- (l) a determination that all relevant physical evidence of the alleged abuse has been preserved, if possible, including taking measures to insure that such evidence is preserved by the person having control of the evidence;
- (m) the review and obtaining of copies of all documents which are not plainly irrelevant to the matter under investigation, as permitted by M.G.L. c. 19C, § 5(1), from a mandated reporter or a mandated reporter's employer acting as custodian of the documents, including but not limited to:
 1. medical and clinical records pertaining to any injury sustained by any person with a disability involved in the matter under investigation;
 2. any other medical and clinical records of the alleged victim, or of any other party with a disability involved in the matter under investigation including, but not limited to, any records designated as subject to the "peer review privilege" pursuant to M.G.L. c. 111, § 204 and any psychotherapeutic record, including, but not limited to, hospital admissions, hospital discharges, dates of hospitalization, purpose of admission, notations of objective indicia of emotional disturbance, objective accounts of a patient's past medical and psychiatric histories which may include earlier hospitalizations, treatments and diagnoses. If such psychotherapeutic record contains the communications or notes of communications between the patient and the psychotherapist, such communications or notes of communications between the patient and the psychotherapist shall be deleted before the remaining portions of the psychotherapeutic record are provided to the investigator. If the investigator submits a release of the psychotherapeutic record executed by the patient or the patient's guardian, the entire psychotherapeutic record including the communications or notes of communications between the patient and the psychotherapist shall be released to the investigator;
 3. any incident report filed pursuant to the requirements of any state agency;
 4. relevant portions of the case records of any person with a disability provided services and involved in the matter under investigation;
 5. any restraint forms completed in connection with any person with disability who is involved in the matter under investigation;
 6. personnel records including, but not limited to, documents regarding employee disciplinary action; employee evaluations, employee training; employment application and an employee's medical information that is "plainly not irrelevant" to either the allegation of abuse being investigated by the Commission or to the Commission's ability to insure appropriate protective services to the alleged victim of abuse;
 7. any policies, procedures or guidelines of the state agency or of the provider of services involved in the matter under investigation or which employs the person complained of;
 8. any existent photographs of any physical injury or property damage plainly not irrelevant to the incident being investigated;

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9. any documents relating to previous cases involving the alleged victim or the identified abuser in which a complaint was filed or investigated pursuant to M.G.L. c. 19C or pursuant to the authority of any other agency of the Commonwealth;
 10. any other documents specifically identified by the investigator and which are plainly not irrelevant to the matter under investigation.
- (n) an interview with the reporter;
 - (o) a determination in cases in which abuse is not substantiated as to whether the allegation reported to the Commission constitutes a false report; and
 - (p) any other tasks that, in the discretion of the Commission, are deemed appropriate and are not plainly irrelevant to the investigation.
- (2) Rights of the Identified Abuser. During interviews, the identified abuser shall have the following rights:
- (a) to be accompanied during an interview by a competent person of his or her own choice who is 18 years of age or older; provided, that said companion is not a supervisor or administrator employed by the identified abuser's employer; or is not otherwise involved or has an interest in the matter under investigation. Other than being present during the interview, said companion shall not otherwise participate in the actual conduct of the interview;
 - (b) to be informed of the existence of the complaint and the general nature of the allegations. Under no circumstances shall the identity of the reporter be disclosed;
 - (c) to be informed that if he/she falls within the category of a mandated reporter, he/she has an obligation pursuant to M.G.L. c. 19C to cooperate in the investigation and truthfully provide to the investigator all information he/she may possess that is relevant to the matter under investigation; and
 - (d) to be informed that his/her refusal to be interviewed or to otherwise cooperate in the investigation will be made a part of the report and that if the person is an employee of a state agency, that unless his/her response to a question could be used against him/her in a criminal proceeding, his/her failure to cooperate shall be reported to the person's supervisor and to the appropriate public agency for possible disciplinary action under that agency's regulations or pursuant to the provisions of any relevant collective bargaining agreement or any other contract;
- (3) Requirements of Investigation and Evaluation Reports.
- (a) Investigation and Evaluation Report. The investigation and evaluation report required to be filed with the Commission pursuant to M.G.L. c.19C, §5(1) shall be composed of two distinct parts; and each shall be respectively known as the "Initial Response" and the "Investigation Report".
 1. Requirements of Initial Response.
 - a. The initial portion of the report shall be known as the "Initial Response", and shall be submitted to the Commission by the investigator within 24 hours after a case is initially reported pursuant to M.G.L. c. 19C, § 4 if the case has been determined to be an emergency and within ten calendar days for all other such reports. For good cause shown, the Commission may extend these filing deadlines.
 - b. The Initial Response shall contain all the information deemed appropriate by the Commission to ensure that the designated investigator has properly investigated and evaluated the allegation of abuse reported to the Commission and evaluated whether the allegation is within the jurisdiction of M.G.L. c. 19C, whether the person with a disability has been abused, whether the person with a disability is at risk of further abuse, and if so, that appropriate protective action has been taken.
 2. Requirements of Investigation Report.
 - a. The second portion of the report shall be known as the "Investigation Report", and shall be submitted to the Commission by the investigator within 30 calendar days from the date the report of abuse was referred by the Commission for investigation. For good cause shown, the Commission may extend this filing deadline.

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b. The Investigation Report shall contain the information acquired during the completion of the required tasks set out in 118 CMR 5.02(1)(a), and all other information deemed appropriate by the Commission to ensure that the designated investigator has properly investigated and evaluated the allegation of abuse reported to the Commission; has made appropriate findings of fact and conclusions; and has made appropriate recommendations regarding the protective services required to remedy the situation where abuse is substantiated.

c. In addition, regardless of whether abuse is substantiated or not, the designated investigator may make a conclusion based on the findings as to whether a violation of other state statutes and regulations exists and whether such violation poses a risk of harm to persons with disabilities. If such a violation is determined to exist, the investigator may make recommendations regarding actions needed to remedy the identified violation including, but not limited to, referral of the matter to the appropriate agency of the Commonwealth that has jurisdiction over the violation and recommendations for remedial actions based upon the statutory and regulatory authority of the agency conducting the investigation for the Commission.

(b) Recipients of Report.

1. Initial Response. Consistent with its authority pursuant to M.G.L. c. 19C, § 3, as part of its case processing, the Commission shall distribute a copy of the Initial Response to the designated service-providing agency within the Executive Office of Human Services.

2. Investigation Report. Consistent with its authority pursuant to M.G.L. c. 19C, § 3 as part of its case processing, the Commission shall forward a copy of the Investigation Report to the appropriate agency within the Executive Office of Human Services and any other agency of the Commonwealth, including but not limited to, the Attorney General or appropriate District Attorney, that has jurisdiction over the alleged victim, the matter under investigation or jurisdiction over professional misconduct for possible prosecution or the imposition of remedial or disciplinary measures in accordance with the requirements of any applicable law or regulation.

5.03: Conduct of Retaliation Investigations

(1) Minimum Requirements of Retaliation Investigation. Each retaliation investigation conducted by the Commission, at minimum, shall include:

- (a) an interview of the alleged victim of retaliation;
- (b) an interview of the identified retaliator;
- (c) interviews with any witnesses to the alleged retaliatory incident(s) subject to the following conditions:

1. If any witness falls within the category of a mandated reporter, he/she has an obligation pursuant to M.G.L. c. 19C to cooperate in the investigation and truthfully provide to the investigator all information he/she may possess that is relevant to the matter under investigation; refusal to be interviewed or to otherwise cooperate in the investigation will be made a part of the report and that if the witness is an employee of a state agency, that unless a mandated reporter's response to a question could be used against him/her in a criminal proceeding, his/her failure to cooperate shall be reported to the person's supervisor and to the appropriate public agency for possible disciplinary action under that agency's regulations or pursuant to the provisions of any relevant collective bargaining agreement or any other contract;

2. Said witness may be accompanied during an interview by a competent person of his or her own choice who is 18 years of age or older; provided, that said companion is not a supervisor or administrator employed by his/her employer; or is not otherwise involved or has an interest in the matter under investigation. Other than being present during the interview, said companion shall not otherwise participate in the actual conduct of the interview;

3. Said witness shall be informed of the existence of the complaint and the general nature of the allegations. Under no circumstances shall the identity of the reporter be disclosed.

- (d) the review and obtaining of copies of all documents which are not plainly irrelevant to the matter under investigation, from a mandated reporter or a mandated reporter's employer acting as custodian of the documents, and of which disclosure is required pursuant to M.G.L. c. 19C, § 5(1) and 118 CMR; and

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(e) any other tasks which, in the discretion of the Commission, are deemed appropriate and are not plainly irrelevant to the investigation.

(2) Requirements of Retaliation Investigation Report. The Investigation Report of the investigation conducted by the Commission shall be submitted to the Commission's Director of Investigations within 45 business days from the date on which the allegation of retaliation was assigned for investigation. Said Report shall contain the information acquired during the completion of the required tasks set out in 118 CMR 5.03(1) and all other information deemed appropriate by the Commission to ensure that the designated investigator has properly investigated and evaluated the allegation of retaliation reported to the Commission; and has made appropriate findings of fact and conclusions. For good cause shown the Commission may extend this filing deadline.

(3) Rights of the Identified Retaliator. During an interview, the identified retaliator shall have the following rights:

- (a) to be informed of the existence of the complaint and the general nature of the allegations. Under no circumstances shall the identity of the reporter of the complaint be disclosed;
- (b) to be accompanied during an interview by a competent person of his/her own choice who is 18 years of age or older provided that said companion is not a supervisor or administrator or is otherwise involved or has an interest in the matter under investigation. Other than being present during the interview, said companion shall not otherwise participate in the actual conduct of the interview; and
- (c) to be informed that a refusal to be interviewed will be made a part of the report and that if the person is an employee of a state agency, that unless his/her response to a question could be used against him/her in a criminal proceeding, his/her failure to cooperate shall be reported to the person's supervisor and to the appropriate state agency for possible disciplinary action under that agency's regulations or pursuant to the provisions of any collective bargaining agreement or any other contract.

5.04: Delay or Deferral of Abuse Investigations

(1) The Commission may determine that an abuse investigation pursuant to M.G.L. c.19C, §§ 4 and 5, and 118 CMR, would duplicate or jeopardize either an ongoing investigation by law enforcement officials concerning possible criminal conduct involved in the case of abuse reported to the Commission or any corrective action undertaken by the referral agency. If such a determination is made by the Commission, the M.G.L. c. 19C investigation may be delayed or deferred.

(2) The delay or deferral of investigations pursuant to M.G.L. c. 19C, §12 can occur only after the Commission has determined that:

- (a) appropriate protective services have been provided to insure the continued safety of the alleged victim from further risk of harm;
- (b) the delay or deferral will not adversely affect the on-going provision of protective services nor the health and safety of persons with disabilities found at risk of harm;
- (c) the Commission's ability to conduct a later investigation will not be unreasonably impaired; and
- (d) all corrective action taken by another official or agency will be conducted in good faith in an impartial manner, by qualified personnel.

(3) The Commission shall monitor the progress of any criminal investigations and any corrective action taken by the referral agency in order to determine when or whether any investigation by the Commission pursuant to M.G.L. c. 19C, §§ 4 and 5 should be initiated or resumed.

5.05: Commission Review of Investigation Report

(1) Upon receipt by the Commission of the Initial Response and the Investigation Report prepared by the designated investigator, the Commission shall review each such document and shall specifically determine whether each document contains the information as required by the Commission; and whether the Initial Response and the Investigation Report are filed with the Commission within their respective time frames.

(2) If following a review of either the Initial Response or the Investigation Report, the Commission determines that the investigator must obtain further information for the document to be complete, and/or must perform additional work on a task previously begun or required for either document to be complete, the Commission shall require the obtaining of such information or performing of such tasks. Determination of the completeness of either document for the purposes of M.G.L. c. 19C is solely within the discretion of the Commission. Additional tasks as may be required by the Commission and the re-submission of the revised Initial Response or Investigation Report shall be completed within such timeframe as may be determined appropriate by the Commission.

(3) In addition, where the investigation has been conducted by a referral agency, the Commission not only may request further investigation as set out in 118 CMR 5.05(2), but the Commission, in its discretion, may conduct its own staff investigation in accordance with M.G.L. c. 19C, §§ 4 and 5 and 118 CMR 5.00. The Commission shall notify the designated referral agency of the Commission's decision to conduct its own staff investigation.

REGULATORY AUTHORITY

118 CMR 5.00: M.G.L. c. 19C, §§ 3(b), (c), (e), (h), 5 and 12.